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No. 84-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,
Petitioners,

v.

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSINGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARTY T. THOMPSON and GREGORY DE SOUSA,

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Were the actions of the Village in denying respondents permission to display the creche on public property a permissible means under *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984), of avoiding a violation of the Establishment Clause of the First Amendment to the U.S. Constitution?

2. Was the district court judgment correct that the semi-permanent posting of an unattended creche on public property constitutes government endorsement of religion — endorsement barred by establishment principles—nullifying any putative individual rights under *Widmar* v. *Vincent*, 454 U.S. 263 (1981), to have government involved in religious expression?

3. Was the Village correct in allowing the use of the park to all its citizenry free of semi-permanent religious symbolism?

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Constitutional Authority

U.S. Constitution, Amendment I	*passim*

INTERESTS OF THE *AMICI CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs before in such cases as *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The Anti-Defamation League submits the accompanying brief because we believe the instant case raises serious questions concerning government support of religion in contravention of the establishment clause of the first amendment.

This brief is also submitted on behalf of the National Jewish Community Relations Advisory Council, and its following national member agencies: B'nai B'rith — Anti-Defamation League, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America — National Women's League for Conservative Judaism, Women's American ORT, and the lll Community Member Agencies representing all major Jewish communities in the United States. These communities are listed in Appendix "A."

The Jewish community, through the actions of its representative agencies, has long sought to insure that church and state are

kept separate. As a small religious minority in this country, commitment to the separation principle serves to help maintain the Jewish community's status as political and civic equals.

The *amici* believe that, rather than serving to derogate from the individual and collective exercise of religious liberty, the separation of church and state is an integral and indispensable guardian of that liberty.

STATEMENT OF THE CASE

Amici adopt the statement of the parties to this appeal which is recited at length in their respective briefs.

INTRODUCTORY STATEMENT

This case raises important questions about the constitutionality of the unattended display on public park land for two weeks of a solitary nativity scene. At issue is whether the Village allowance of the display of an unattended, solitary nativity scene standing on government park property constitutes government support of religion in violation of the first amendment establishment clause.

Amici submit that the erection and display on government land of the isolated nativity scene herein, a concededly religious symbol, without the context of any surrounding secular setting, impermissibly advances religion. Accordingly, the Village of Scarsdale's denial of permission to display the creche is necessary to avoid violation of the establishment clause.

The district court decision in this case held that the Village allowance of the display herein would violate establishment concerns. It determined that while there was a free speech right to access to the Boniface Circle Park, the Village of Scarsdale's denial of access to the public park land was justified because of the establishment problems posed by the display of an exclusively religious nativity scene unattended for two weeks on government land. 575 F. Supp. 1112, 1125-1126. In reversing the district court's holding as to the establishment question, the Second Circuit held that the right of access to Boniface Circle could not be defeated by establishment concerns because the display of the unattended

solitary nativity scene in the Scarsdale Park was constitutionally permissible under this Court's decision in *Lynch* v. *Donnelly*, 104 S. Ct. 1355. Slip op. at 28. This analysis, *amici* submit, is incorrect.

The Scarsdale creche stands alone on government land, without any other secular symbols and without an accompanying speaker. As such, it is both a religious symbol bereft of the holiday setting held crucial to the *Lynch* decision, 104 S.Ct. at 1362, 1365, and it avails itself of greater government sponsorship than what the Court deemed to be "*de minimis*" aid sustained in *Lynch*, 104 S. Ct. at 1364, through the unattended use of government land which bespeaks government support. These factors create an establishment problem barring the Village display of an unattended exclusively religious nativity scene on public park land.[1]

Should this Court determine there is no establishment concern posed by the unattended religious symbol standing on government land in this case, it would relegate a question of constitutional proportions — the extent to which government may aid religion — to legislative fiat or majority rule. Perhaps in certain situations such as this Court deemed to be present in Pawtucket, the majority or government sponsorship of religious symbols will, because of its secularized setting and "*de minimis*" aid not be deemed violative of constitutional concerns. Or perhaps as in Scarsdale, a village will itself be sensitive enough to deny permission to private citizens seeking to use government land as the message bearer for their particular religious symbols. But Pawtucket and Scarsdale

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1. *Amici* also opposed the government sponsorship of the nativity scene display in *Lynch*. *See* Brief *Amici Curiae* of the Anti-Defamation League of B'nai B'rith and the American Jewish Congress in support of Respondents, *Lynch* v. *Donnelly*, 104 S. Ct. 1355. This sponsorship, however, was upheld by the majority of this Court. Without here reexamining the merits of that decision, *amici* submit, and this Court appears to have agreed in granting *cert.*, that this case raises different questions concerning government support for religion. At issue is whether government may dedicate its land to the religious use sought herein — the display for half a month of the concededly religious and sectarian nativity scene.

are far from representative. All across this nation, local governments are requested to aid sectarian religious displays. In many cases, those governments have approved such displays and then they have become the subject of court challenges. *E.g., ACLU v. City of Birmingham,* No. 83-CV-3348-DT (E.D. Mich. July 23, 1984) (striking solitary nativity scene standing on city hall premises), *appeal pending,* No. 84-1637 (6th Cir. 1984). And where these have been rejected, as in the instant case, the issue has become a political one with, as here in Scarsdale, politicians campaigning based upon their stand on this issue. (J.A. 98-99, 100; J.Ex. 191-1306).

The issue of government aid for religious symbols is not appropriate for political or majority decision-making, *amici* submit. The nativity scene and comparable religious symbols for the more than 300 religions and sects flourishing in the United States are best served by protecting them from the vagaries of the political process, where they are subject to both governmental promotion and interference. That is the mandate of the first amendment establishment clause.

In the absence of such establishment mandate, as this Court held in *Lynch,* the authority of each local government remains — to determine for itself whether to provide aid to religious displays. This authority, exercised here by the Village of Scarsdale, is challenged on the basis of an alleged countervailing constitutional right of free speech. Contrary to the court of appeals' holding herein, however, there is no unfettered free speech right to erect and display unattended semi-permanent religious symbols on government land. The unattended religious symbol display herein creates the impression of government support for religion. This support violates establishment principles. *See Stone* v. *Graham,* 449 U.S. 39, 42 (1980); *ACLU* v. *Rabun,* 678 F.2d 1379, 1390 (11th Cir. 1982).

It is this government support of a private party's particular religious symbol which is at issue in this case. For respondents claim a right to such government support. They have been offered many sites for their nativity scene, both commercial and religious.

575 F. Supp. at 1120. In seeking only public property the Creche Committee declared that use of a church site would destroy their "ecumenical" objective. *Id.* This "ecumenical" objective of seeking government endorsement for particular religious expression impermissibly blurs those lines which hitherto have separated and protected both government and religion. In so determining and in rejecting permission for display of the unattended nativity scene at issue herein, the Village of Scarsdale acted within the bounds of its authority and pursuant to the dictates of our Constitution.

I

THE ESTABLISHMENT CLAUSE BARS THE SEMI-PERMANENT UNATTENDED DISPLAY OF A RELIGIOUS SYMBOL ON GOVERNMENT PARK LAND.

A. The Effect of the Unattended Semi-Permanent Creche is the Advancement of One Religion to the Exclusion of Other Religious Minorities.

1. The presence on public land of the nativity scene without a surrounding secular context impermissibly advances one religion.

In *Lynch*, this Court in its majority, concurring and dissenting opinions agreed that the creche is a religious, sectarian symbol. 104 S. Ct. at 1365, 1369, 1377. The Court held that "[o]f course the creche is identified with one religious faith," 104 S. Ct. at 1365, but "notwithstanding the religious significance of the creche," 104 S. Ct. at 1366, the creche in the context of its surrounding display, which in Pawtucket included carollers, candystriped poles, a clown, elephant and bear, did not contravene the establishment clause.[2]

> When viewed in the proper context of the Christmas holiday season, it is apparent that, on this record, there is insufficient evidence to establish that *the inclusion of the*

2. Like the majority, the dissenters also find the creche to be a religious symbol but they viewed that: "[E]ven in the context of Pawtucket's seasonal celebration the creche retains a specifically Christian religious meaning." 104 S. Ct. at 1377 (Brennan, J., dissenting).

> *creche* is a purposeful or surreptitious effort to express some kind of subtle government advocacy of a particular religious message.

Lynch, 104 S. Ct. at 1362-63 (Burger, J., majority opinion) (emphasis added).

And the Court noted, "it would be ironic . . . if *the inclusion of a single symbol* . . . would so 'taint' the city's exhibit as to render it violative of the establishment clause." *Lynch*, at 1365 (emphasis added).

The importance of the "secularizing" context of the Pawtucket creche as held by the Court[3] reflects a longstanding concern that where there is government sponsorship of a religious dispiay, it impermissibly advances religion where it is not integrated into a secular context. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (1980) (striking posting of Ten Commandments on schoolhouse wall, not integrated into school curriculum); *Abington* v. *Schempp*, 374 U.S. 203 (1963) (striking bible reading in public schools not part of secular program of education). The secular context is seen as diminishing the religious component, which the Court concedes if analyzed alone would "inevitably lead to its invalidation under the establishment clause." *Lynch*, 104 S. Ct. at 1362.

How the admittedly religious creche is mitigated by the secular Pawtucket holiday setting is highlighted by Justice O'Connor:

3. Without analyzing the merits of the "context" argument, it was central to the holding accepted by the majority in *Lynch*. Since *Lynch* governs this case on this point, the "context" principle enunciated in *Lynch* must be applied here. Lower courts prior to *Lynch* have also found that the context in which the religious symbol occurs can secularize an otherwise prohibited effect of advancing religion. Thus, in *Citizens Concerned for Separation of Church and State* v. *Denver*, 526 F. Supp. 1310 (D. Colo. 1981), the court found that the inclusion of the creche in an overall Christmas display where the creche is of equal prominence with Santa Clause and reindeer minimizes both its importance as a religious symbol and the citizens' perception of it as an endorsement by the city of Christianity. In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court held that the creche's setting in the Christmas pageant of peace alongside trees, reindeer and a yulelog, diminished its effect of advancing religion.

> Although the religious and indeed sectarian significance of the creche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display....

Lynch, 104 S. Ct. at 1369.

Bereft of the "overall holiday setting" present in Pawtucket is the Scarsdale nativity scene. It would stand alone in Boniface Circle, without any other more secular symbols of the Christmas holiday.

Clearly the nativity scene which would stand in Boniface Circle is a religious symbol of one faith — Christianity. This is conceded by the Court in *Lynch*. *See* 104 S. Ct. at 1365, 1366, 1369. Whereas this Court held that the nativity scene's religiosity is mitigated by the secularizing context present in the Pawtucket display, 104 S. Ct. at 1362, 1365, 1369, no such context is present here. *Lynch* which governs this case and caselaw, decided both prior and subsequent to *Lynch*, which consider the constitutionality of a nativity scene standing alone on government property have held that the exclusively religious nature of the display renders it unconstitutional. Thus, in applying the *Lynch* decision to a creche standing alone on city hall land the district court in *ACLU* v. *Birmingham*, No. 83-CV-3348-DT (S.D. Mich. July 23, 1984), *appeal pending*, No. 84-1637 (6th Cir. 1984), expressly noted that the creche had no surrounding holiday context: "This creche is displayed on the lawn of the city hall . . . there is nothing else displayed for the season on the lawn of city hall. There are no secular objects included with this creche." Slip op. at 3. This lack of secularizing context was the basis for the court's distinction from *Lynch*:

> This case is completely unlike the *Lynch* case. Here, the nativity scene stands alone on public property, conveying only the religious message of the Christmas season, suggesting nothing of the secular pleasure and good will of the season, which Justice Burger found to be the emphasis of the *Lynch* display.

ACLU v. *Birmingham*, slip op. at 5.[4]

Similarly, other religious symbols have been struck down when not integrated into a secularizing context. In *ACLU* v. *Rabun*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (llth Cir. 1982), the court held that a cross, an obviously Christian symbol, when placed on public land has no other effect but to advance impermissibly the cause of the underlying religion. As the Oregon Supreme Court noted in *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970), "[t]he employment of publicly-owned and publicly-maintained property for a highly visible display of the character of a cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol."*Id.* at 363. Similarly, in *Goldstein* v. *Fire Department of the Village of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983), although invalidating the practice under the purpose prong of the tripartite test, Judge Werker noted that the presence on public property of a sign proclaiming "Keep Christ in Christmas," "created the obvious impression that defendants either were promoting or approving the theological origins of Christmas." *Id.* at 1391. And, in *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980), the city of Philadelphia erected an impressive platform complete with a cross from which Pope John Paul II was to offer mass on his visit to the city. The platform which was left standing for more than a week to allow residents to observe it provided the setting for the Pope to deliver his prayers. The aid of the city in erecting the platform was held to be an impermissible advancement of religion.[5]

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4. *But see, ACLU* v. *Harris County*, No. 83-2549 (5th Cir. March 30, 1984) where the Fifth Circuit affirmed a district court order upholding the constitutionality of two nativity scenes displayed on city courthouse property.

5. Other courts in focusing on the danger of these symbols on public land have found the practice invalid under the purpose prong of the tripartite test and have not had to reach the question of effect. *See, e.g., Stone* v. *Graham*, 449 U.S. 39 (striking posting of Ten Commandments on public school walls); *Fox* v. *City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Ca. Rptr. 867 (Cal. 1978)(holding unconstitutional a cross on public property).

The importance of the context of government sponsorship of a religious symbol is clear from the above caselaw and this Court's decision in *Lynch*.

Without a secularizing context what is at issue here is the solitary nativity scene. As characterized by Justice Brennan in *Lynch*: 'It is . . . best understood as a mystical re-creation of an event that lies at the heart of Christian faith." 104 S. Ct. at 1378.

> It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path towards salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic re-enactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith.

104 S. Ct. at 1377.

In Scarsdale, it is this exclusively religious symbol standing alone for which respondents seek government land. Under *Lynch*, this donation of government land to an exclusively religious sectarian symbol display, without any secularizing setting constitutes government aid to one religion — in contravention of this Court's principles barring such establishment. *See also Stone* v. *Graham*, 449 U.S. at 42. To hold otherwise is to have *Lynch* become carte blanche for all those seeking to use public property for their religious uses.

> 2. *The use of government land for display of an unattended nativity scene provides a substantial benefit to religion.*

The aid sought in this case is of far greater benefit to religion than the funding provided in *Lynch*. As this Court held in *Lynch*, the extent of government aid involved in the Pawtucket case was "*de minimis*" — the $200 value of the creche which the city owned. 104 S. Ct. at 1364. While city-owned, the creche and the

largely secular display at issue in *Lynch* stood on private, not government property.

In contrast, the creche herein would stand in a public park, thereby availing itself of the government imprimatur borne by government land. The impact of such an imprimatur has been recognized by this Court in its decisions. In *Lynch*, this Court contrasted the minimal funding provided by Pawtucket in paying for the creche with the aid involved in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).[6] In *McCollum*, this Court noted that the government had used "the public school building for teaching of religion." 333 U.S. at 212, *cited approvingly in Lynch*, 104 S. Ct. at 1364. This use of government buildings together with the use of state attendance laws, constituted a substantial benefit. 104 S. Ct. at 1364. The donation of the public premises to religious speakers, held to aid religion in *McCollum*, is just like the land in Scarsdale. In both, the religious message, while private in its origins — outside religious instructors in *McCollum* and the private creche committee in Scarsdale — is afforded substantial government benefit. This benefit is the use of government property for promotion of a religious message. Moreover, in Scarsdale, unlike *McCollum*, there are no accompanying transient private speakers which could mitigate the appearance of the government endorsement of the religious expression.

The substantial benefit accorded to religion when public land is used for the display of a nativity scene is characteristic of the aid involved when other religious symbols are displayed on public premises, as is recognized in the many cases striking this aid. *See, e.g., Stone* v. *Graham*, 449 U.S. 39, 42 (in striking Ten Commandments posted on public classroom walls on religious purpose

6. As *Lynch* shows, the origin of the funding for religious symbol displays, whether public or private, is not dispositive. Instead, the establishment focus is on the extent and nature of government support for a particular religious activity. *Compare Lynch*, 104 S. Ct. 1355, 1364 (supporting publicly funded creche display on private property) *with Stone v. Graham*, 449 U.S. 39 (striking privately funded posting of Ten Commandments on public school walls) *and Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) (striking state and school sponsored prayer in public schools).

basis, the Court held "mere posting of the copies under the auspices of the legislature provides the 'official support of the . . . Government' that the establishment clause prohibits."); *ACLU* v. *Rabun*, 678 F.2d 1379 (11th Cir. 1982) (striking large cross on state park property which aided one particular religion); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) (disallowing city sponsorship of platform for papal mass because it unconstitutionally aided Roman Catholic church); *ACLU* v. *Eckels*, No. H-82-0035 (S.D. Tex. May 22, 1984) (striking permanent crosses and Star of David in public park); *Goldstein* v. *Fire Department of the Village of Suffern*, 551 F. Supp. 1389, 1391 (S.D.N.Y. 1982) (striking sign posted on village-owned fire house as city aid supportive of theological message); *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970) (holding donation of public land to permanent display of religious symbol constituted impermissible government aid).

As is evident in the caselaw there is a substantial benefit to religion at issue in this case. This is also conceded by respondents. After the controversy began over the Scarsdale creche, respondents both elected not to display the creche on private property, 575 F. Supp. at 1120, and rejected several offers from local churches to display their creche on a rotating basis on church properties. This offer was rejected chiefly because of their "desire that the creche speak an 'ecumenical' message, and the perception that this goal would best be achieved if the creche spoke from public land." 575 F. Supp. at 1120.

The role of Boniface Circle is clear, at least in respondents' minds. It converts an admittedly religious symbol (Creche Committee Complaint ¶ 18, Citizens' Group Complaint ¶ 16) to one that is "ecumenical" and endorsed by government — a substantial benefit. Yet, the Second Circuit miscasts the benefit as "incidental." Slip op. at 29. It compares the turning over of government park land for display of an unattended semi-permanent religious symbol to the access of a university forum by speakers, religious and non-religious alike. *Id.* In this respect, the

court errs. The governmental benefit accorded when a private speaker exercises his personal free speech communication rights in a public forum is different from that benefit accorded when a religious symbol is left unattended as a fixture on government land. *Compare O'Hair* v. *Andrus*, 613 F.2d 931, 934-935 (D.C.Cir. 1979) (upholding a mass conducted on public property) *with Gilfillan* v. *Philadelphia*, 637 F.2d 924 (1980) (striking city construction and display for two weeks of a platform for papal mass). As is discussed supra at 10; *infra* at 14-21, the benefit at issue herein concerns the use of government land, in the absence of any accompanying independent speaker, which presents the appearance of government endorsement of an unattended nativity scene display's religious message.

In discounting the nature of this benefit to the religious symbol herein, the court of appeals misapplies the *Lynch* decision. For the court holds that the aid characterized by this Court as *"de minimis"* in *Lynch* is greater than the government aid at issue in this case:

> If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the village's neutral accommodation herein to permit the display of the creche in a traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary effect prong of the *Lemon* test and, therefore, violative of the establishment clause.

Slip op. at 29.

The court's *a fortiori* argument misses the point. Notwithstanding the source of the Scarsdale creche's funding, deemed irrelevant by this Court in *Lynch* and in *Stone*, its display on government land confers a substantial benefit — one recognized in the caselaw and valued by respondents enough to eschew alternative non-governmental sites and litigate for the Circle.

The creche in Boniface Circle is just like the Ten Commandments struck by this Court in *Stone* v. *Graham*. Both are privately funded, yet both in their posting on government premises would

curry "the official support of Government" that the establishment clause prohibits. 449 U.S. at 42.

II

THE VILLAGE IS FREE TO EXCEED THIS COURT'S ESTABLISHMENT MANDATE PROVIDED AS IN THIS CASE THERE IS NO COUNTERVAILING CONSTITUTIONAL CONCERN.

1. Local governments have authority under ***Lynch*** *to deny sponsorship of religious symbol displays.*

The Village's action in refusing to turn over Boniface Circle to respondents for a nativity scene display was necessary to avoid violation of the establishment clause principles. Yet, if this Court were not to find it so required, the Village would still be free to make its own determination as to whether it wished to permit its land to be used for this purpose.

Pursuant to this Court's decision in *Lynch*, local governments have the authority to make their own determinations as to whether they wish to sponsor religious symbol displays. *Lynch* held that a a town could sponsor a creche in its holiday display without violating the establishment clause. It did not hold that a town must do so. In eschewing an establishment mandate barring government funding of religious symbols, *Lynch* confers authority upon local governments to make their own determinations regarding such sponsorship. Accordingly, under *Lynch*, a local government remains free to have a stricter view of the establishment mandate than the federal government; or it may have concerns regarding the political divisiveness of such sponsorship in its community, or its concerns may be economic in nature, *i.e.*, it may wish the funding to go for purposes other than nativity scenes, such as education, etc.

This local discretionary authority is created whenever this Court eschews an establishment mandate. As characterized by Justice White in *Widmar* v. *Vincent*, the parameters of this local

authority are formed by the nature of establishment clause analysis. The establishment clause "sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is required to do." 454 U.S. 263, 282 (1981)(dissenting op.)(emphasis added). "The step from the permissible to the necessary, however, is a long one." *Id.*

This local discretion pursuant to establishment clause analysis is defeated only by a countervailing constitutional concern. *See Widmar*, 454 U.S. at 275-276 (majority op.). Such countervailing concerns were deemed by this Court to be present in *Widmar* where this Court declared "the state interest... in achieving greater separation of church and state than is already insured under the establishment clause of the federal constitution, is limited by the free exercise clause and in this case by the free speech clause as well." *Id.* at 276-277.

No such countervailing constitutional interests are present here. As is shown *infra*, the free speech concerns present in *Widmar* which concerned access to a university forum by a religious student group are simply not at issue as to the unattended posting of a religious symbol on government park land. In the absence of a countervailing constitutional concern, therefore, the Village of Scarsdale retains its discretion to determine the proper extent of its sponsorship of private sectarian symbols.

III

THERE IS NO CONSTITUTIONAL RIGHT TO DISPLAY UNATTENDED RELIGIOUS SYMBOLS ON PUBLIC PROPERTY BECAUSE SUCH DISPLAY CREATES THE IMPERMISSIBLE APPEARANCE OF GOVERNMENT SUPPORT OF RELIGION IN CONTRAVENTION OF ESTABLISHMENT PRINCIPLES.

Scarsdale's right to deny permission to display the exclusively religious nativity scene herein is not defeated, as respondents urge, by alleged free speech rights to public property for display of the unattended nativity scene at issue. For even traditional public forums such as parks — open to religious and non-religious

uses — may be used in a way that causes public perception of government sponsorship of religion, in violation of establishment. The rights of private parties to sponsor unattended nativity scenes on government land are not, the Second Circuit's decision notwithstanding, concurrent with the rights of religious speakers in public parks because the display of unattended religious symbols on government premises, unlike their use by religious speakers, raises a presumption of government endorsement. Such an appearance of sponsorship is unconstitutional as to symbols which are religious. Here, this perception of government sponsorship as held by the district court below, is due to a variety of factors:the fact that the nativity scene would be left unattended for half a month on government property, the absence of any other surrounding symbols, and the recurring annual reservation for twenty four years of the park only for the religious nativity scene at issue herein.

What is sought in this case is the donation for half a month of Boniface Circle for religious purposes. At issue is a "right to construct and leave a religious symbol on government land." This right was rejected by the district court in this case. It found that where a citizen's religious expression takes the form of displaying unattended religious fixtures on government land, the message sought to be communicated to other citizens was not one of individual religious expression, but rather one of government endorsement of the religious message — impermissible under the establishment clause as to religious symbols.

> [W]hen a symbol is implanted on public land that land uniquely becomes the message bearer and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

575 F. Supp. at 1131.

Where religious symbols are posted unattended on government land, the district court held that there is an appearance of government support of the symbol. 575 F. Supp. at 1131. This presumption of state sponsorship is supported in the caselaw. This Court and district and appellate courts considering the constitutionality under establishment principles of privately sponsored religious symbols posted on public property have found that, private funding notwithstanding, the posting of such symbols on government property is violative of establishment concerns and creates a statement by government in support of religion. In *Stone* v. *Graham*, 449 U.S. 39 (1980)(*per curiam*) (striking posting of privately sponsored Ten Commandments on public school walls), the Court considered a privately sponsored religious symbol posted on public property. There it held that "[i]t does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislation provides the 'official support of the . . . Government' that the establishment clause prohibits." *Stone*, 449 U.S. at 42. Similarly, in *McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948)(barring outside privately sponsored religious groups from use of public school premises), the Court found that public property was being impermissibly used to aid private religious groups in spreading their faith. *Id.* at 210.

The conversion of a private religious message to that of the state was noted by the district court in *ACLU* v. *Eckels* , No. H-82-0035 (S.D. Tex. May 22, 1984), *appeal filed*, No. 84-2152 (6th Cir. July 5, 1984)(striking privately sponsored permanent crosses and Star of David in public park): "These permanent symbols become state symbols when placed in a public park, and they carry purely religious messages." Slip op. at 30. And, in *Lowe* v. *City of Eugene*, 254 Or. 518, 463 P.2d 360 (Or., 1969) 397 U.S. 1042 (1970), *cert. denied*, 397 U.S. 1042 (1970), in considering the constitutionality of a cross on city park property the court of appeals held that turning the use of public land over

to the permanent display of a religious symbol constituted impermissible government sponsorship. *See* 254 Or. 518, 463 P.2d 316, 363.

> While government...can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige or property at the disposal of private property or groups.

Id., citing approvingly to *McCollum* v. *Bd. of Educ.*, 333 U.S. 203 (1948).[7] Central to these decisions finding an unconstitutional establishment of religion is that government, in turning over public land to private citizens for the display of religious symbols, is itself sending a message supportive of religion.

The government endorsement, held by the district court to be present where a nativity scene would be left unattended for two weeks on government land, was found not to be rebutted in any

7. These cases finding unconstitutional government sponsorship despite the privately funded nature of the religious symbols track those decisions disallowing religious symbols which have been publicly sponsored. In *ACLU* v. *Rabun*, 678 F.2d 1379 (striking large cross on state park property), the court found "when a government permits religious symbols to be constructed on public property," the government has the burden of justifying its engaging in activities which "may appear to endorse the beliefs of a particular religion." 678 F.2d at 1390. Similarly in *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) (disallowing city sponsorship of platform for papal mass), the Court of Appeals for the Third Circuit considered that the display of a papal mass platform for more than a week was the creation by the city of a "temporary shrine." 637 F.2d at 931. This creation of a temporary shrine, more temporary than the nativity scene at issue herein, constituted government endorsement of religious speech. According to the court the erection of the platform allowed the Pope to bring a "religious message with the help of the city from the Roman Catholic Church to millions of persons." *Id.* Most recently, in applying the *Lynch* decision to hold unconstitutional a nativity scene standing alone on city hall premises, the district court in *ACLU* v. *Birmingham*, No. 83-CV-3348-DT (E.D. Mich. July 23, 1984), *appeal pending*, No. 84-1637 (6th Cir. 1984) noted: "This is the presentation of the creche alone, which is the message that this is a Christian city." Slip op. at 6. Similarly, in *Goldstein* v. *Fire Department of the Village of Suffern*, 551 F. Supp. 1389 (S.D.N.Y. 1982), a sign bearing the message "Keep Christ in Christmas," and posted on a village owned fire house, was found by the district court to give the appearance that the defendants were making a statement supportive of the theological origins of Christmas. *See* 559 F. Supp. at 1391.

way in this case. The district court found that the semi-permanent unattended posting of the scene in the park, together with the fact that the only recurring reservation by private citizens of the park for a symbol display was that of the nativity scene herein, cemented the connection between Scarsdale and the private creche. 575 F. Supp. at 1124, 1131, 1132.[8]

Moreover, this appearance of government sponsorship of religion exists notwithstanding the disclaimer provided by the Creche Committee. As the district court found, no matter what size the disclaimer, "it is doubtful that a sign saying that a symbol had been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." 575 F. Supp. at 1132-1133.

That the appearance of a government message endorsing religion is precisely what is sought by respondents here is evident by their rejection of private property for display of the creche. For six years, despite many offers of alternative sites, the Creche Committee has sought public property with its "ecumenical" government message. *Id.* at 1120, 1131. "[C]ultivating an aura of Village approval" of the creche was, the district court held, "one of the factors fueling plaintiffs' desire to have the creche on public property."*Id.* at 1131.

Despite this government endorsement sought by the respondents and found by the district court in this case, the court of appeals below would grant a right of access for the unattended nativity scene here on this Court's decision in *Widmar* allowing access to a university forum for religious speakers. Slip op. at 29.

Yet there are numerous fundamental differences between the rights of religious speakers exercising their individual free speech rights and the rights claimed by the citizens herein to post an unattended religious fixture on village land. In upholding the

8. While Boniface Circle might have been hypothetically "available" to other symbols over the years as claimed by the Second Circuit, slip op. at 29, it was not so used. 575 F. Supp. at 1132. Further as to use of the park by other symbols concurrent with the nativity scene here, the small size of the Circle would make such use prohibitive, notwithstanding the court of appeals' *dicta* on "availability." Slip op. at 29.

right of religious student groups to use a university classroom in *Widmar*, 102 S. Ct. 269 (1981), this Court emphasized a pre-existing use of the university forum by more than 100 other speakers — religious and not religious. Because of this diversity of speakers, this Court found that there would be no appearance of sponsorship or government endorsement of religion. 102 S. Ct. at 277. In the absence of this government sponsorship, the use of the university forum by religious student groups was deemed by the Court to be "an incidental" benefit to religion, 102 S. Ct. at 276, and and individual religious free speech rights were dispositive. Similar to *Widmar* are the many cases upholding the rights of religious speakers to speak in parks or streets. *See, e.g., Niemotko* v. *State of Maryland*, 340 U.S. 268 (1951) (upholding bible discussions in public park); *Saia* v. *New York*, 334 U.S. 558 (1948) (permitting religious lectures through loud speakers in park); *Fowler* v. *State of Rhode Island*, 345 U.S. 67 (1943) (upholding use of public park for religious exercises); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) (upholding right of religious groups to hold street parade); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (upholding distribution of religious literature). *See Heffron* v. *ISKCON*, ___U.S.___, 101 S. Ct. 2559 (1981) (upholding religious solicitation in public fair).

Unlike *Widmar* and the above cases where there are transient speakers and a great diversity of individual expression which vitiate the appearance of government expression about religion, here the nativity scene is unattended by any individual speaker, thus its posting on government land bespeaks government support. Compounding this effect are a number of factors: The nativity scene here would be posted unattended in the park for about half a month. This continuous and lengthy use of government property the district court found to be like the impermissible permanent donation of government land for religious expression. *See* 575 F. Supp. at 1128, 1129 n.17. *Cf. Tilton* v. *Richardson*, 403 U.S. 672 (1971). Further unlike *Widmar* with its broad array of religious and non-religious speakers, mitigating the religious use of the university forum, in Boniface Circle there is no

mitigating array of diverse symbols. Historically, the nativity scene has been the only symbol with a recurring reservation in the park. 575 F. Supp. at 1124, 1132. And, concurrent with the nativity scene there are no other private symbols posted on Boniface Circle. While the Second Circuit dwelled on the hypothetical "availability" of the park for other symbols, slip op. at 29, the inquiry under *Widmar* is whether prior to the religious use of a forum there has been broad access to the forum by an array of expression, religious and non-religious. *See Widmar*, 454 U.S. at 274 & n. 13. Even if the inquiry were in the hypothetical, it is dubious that given the size of Boniface Circle, there is a hypothetical "availability" concurrent with the nativity scene for an array of diverse symbols or first amendment communication among symbols.

The instant nativity scene affixed alone for half a month on government property sends such a strong message of government support that the district court found that any disclaimer regarding its private origins could not "cure" the impermissible endorsement herein. *See* 575 F. Supp. at 1132-1133.

This unrebutted appearance of government sponsorship triggered by the nativity scene displayed on Boniface Circle vitiates any possible claims to individual religious free speech rights here.[9]

9. Similar to the presumption of government speech supportive of religion where religious symbols are erected and left on government property, is the presumption in the public schools. Religious exercises in the public school forum trigger a presumption of government endorsement. In public schools this has been attributed to the schools not being open forums but rather government controlled. *See McCollum* v. *Bd. of Educ.*, 333 U.S. 203, 212-213 (1948)(government buildings and attendance laws aid religion). Accordingly, where this government endorsement of a religious message has been found, this finding has impeded a similar finding of student religious speech rights to school sponsorship of prayer. For the courts have found that where there is government sponsorship of religion it is the government which appears to be speaking. *See Lubbock Civil Liberties Union* v. *Lubbock Indep. School Dist.*, 669 F. 2d 1038, 1048 (5th Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 800 (1983); *Brandon* v. *Bd. of Educ.*, 635 F.2d 971, 977 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Stein* v. *Oshinsky*, 348 F.2d 999 (1965); *Hunt* v. *Board of Educ.*, 321 F. Supp. 1263, 1266-67 (S.D. W. Va. 1971); *Johnson* v. *Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, —, 127 Cal. Rptr. 43, 52-53, *cert. denied*, 434 U.S. 877 (1977); *Trietley* v. *Board of Educ.*, 65 A.D.2d 1, —, 409 N.Y.S.2d 912, 916-17 (1978).

The presence of the impermissible government message supportive of religion overwhelms any individual religious message and is in fact the reason for the establishment prohibition. *See Engel*, 330 U.S. at 429. *Compare Gilfillan* v. *Philadelphia*, 637 F.2d 924 (1980) (striking as impermissible the erection and display for two weeks by a city for a Papal mass) *with O'Hair* v. *Andrus*, 613 F.2d 931, 934-935 (D.C. Cir. 1979) (upholding Papal mass). Where as here the form of requested religious expression inevitably implicates government endorsement — impermissible as to religious symbols under the first amendment establishment clause — as the district court held, it is not protected expression. For the rights of religious speakers to air their views are not at issue in this case. Here, the respondents do not wish to have access to the park to exercise their own individual religious speech rights.[10] Instead, the group wishes, through the display of an unattended religious fixture on government land, to have government speak for them. This, as the district court held, they may not do. As noted by the New York Court of Appeals in *Trietley* v. *Bd. of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), "[p]etitioners are free to pursue their religious beliefs; they are only prevented from enlisting...[government] aid to do so." 409 N.Y.S.2d 912, 917. *See Engel* v. *Vitale*, 370 U.S. 421, 435.

10. Such protected expression presumably would include speakers gathering in Boniface Circle bearing their own creche and the unattended display of the creche on private or church property. *See McCreary* v. *Stone*, 575 F. Supp. at 1131 n. 20. In Scarsdale, these forms of protected expression are already in use, with many homes and churches displaying nativity scenes on their property. *Id.* at 1121, 1131 n.20.

IV

PRESENCE OF NATIVITY SCENE, A RELIGIOUS SYMBOL, FOR TWO WEEKS ON PUBLIC PARK PROPERTY IMPEDES RIGHTS OF SCARSDALE CITIZENS TO USE PARK FREE OF SECTARIAN RELIGIOUS INFLUENCE

Boniface Circle is a park with public access. It consists of 3,255 square feet, is oval in shape, largely grass covered and lies in the heart of the retail business district of Scarsdale. 575 F. Supp. at 1115. The park, according to findings by the court below, is "visited year round by persons of 'all stripes,' ... for what appear to be varying reasons, among them as a way-through for pedestrians from one street in the business district to another." *Id.*

This access to the public park, as found by the lower court, by persons of all "stripes," for "varying reasons," including necessary pedestrian traffic, would be prohibited if the village were to allow the erection of a religious symbol for half a month on park property. Unlike the transient nature of a religious speaker on a public forum, *cf. O'Hair* v. *Andrus*, 613 F.2d 931 (C.A. D.C. 1979) (upholding Papal mass on government mall), the permanence of a nativity scene on the public park for half a month, imbues the park with Christian symbolism and simultaneously deprives others of their right to use the park as they wish, without the pervasive presence of the creche. *See* this brief, *supra* at 15, 18-20.

This was the holding in *ACLU* v. *Rabun County Chamber of Commerce*, 678 F.2d 1379, in considering, for standing purposes, a plaintiff's injury in being deprived of access to secular public land. In *ACLU* v. *Rabun*, a cross was situated on public land to which "all residents of Georgia have a right of access." 678 F.2d at 1384. This right of access to the public park, the Eleventh Circuit found, was impaired "as a consequence" of the presence of the cross on the public park. 678 F.2d at 1388. The presence of the cross had a "physical and metaphysical impact" which legitimately caused plaintiffs to be unwilling to use the park. Recognized was the deprivation inherent in plaintiffs either having to choose other parks or "hav[ing] their right to use Black Rock

Mountain State Park conditioned upon the acceptance of unwanted religious symbolism." 678 F.2d at 1389.

Similarly, in *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970), the Court of Appeals for the D.C. Circuit considered the constitutionality of an illuminated creche in a Christmas pageant on federal park land. In determining the nature of appellants' injury the court held "citizens may sue to enjoin a government holding land in trust as a park from impermissibly diverting the use so as to destroy their beneficial interests as park users. They likewise have standing to complain when the park lands are impermissibly devoted to uses that contravene the Establishment Clause." *Id.* at 947.

Like the plaintiffs in *ACLU* v. *Rabun*, and in *Allen* v. *Hickel*, here too the citizens of Scarsdale have rights to use their public park, rights which may not be encumbered with "a forced acceptance of unwanted religious symbolism." *ACLU* v. *Rabun*, 678 F.2d at 1389. This right is barred here by the presence of the nativity scene, an intrinsically religious symbol, posted on Boniface Circle, public park land, for half a month. For the citizenry of Scarsdale, of diverse and pluralistic religious faiths,[11] turning the park over to this Christian symbol deprives them of their right to enjoy the park free of sectarian religious influence.

11. According to the court below, "the record in varying places suggests that the community of Scarsdale includes adherence of Christian, Jewish and several 'Eastern' religious faiths. The village also has a Mormon Church and followers of the Bahai Faith and several newer religions such as that of the Reverend Moon." 575 F. Supp. at 1115 n.2.

CONCLUSION

The display on government land of the concededly sectarian religious nativity scene herein constitutes a conversion of public property to religious use. This government support of religion has not hitherto been deemed permissible by this Court. For the reasons set forth above, *amici* respectfully submit that the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Birmingham Jewish Community Council
Greater Phoenix Jewish Federation
Tucson Anti-Defamation—Community Relations Committee of the Jewish Community Council
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles Community Relations Committee of Jewish Federation-Council
Oakland Greater East Bay Jewish Community Relations Council
Orange County Jewish Federation
Sacramento Jewish Community Relations Council
San Diego Community Relations Committee of United Jewish Federation
San Francisco Jewish Community Relations Council
Greater San Jose Jewish Community Relations Council
Greater Bridgeport Jewish Federation
Greater Danbury Community Relations Committee of Jewish Federation
Greater Hartford Community Relations Committee of Jewish Federation
New Haven Jewish Federation
Eastern Connecticut Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
Jewish Community Relations Council of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington Jewish Community Council
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Community Council
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation

Sarasota Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago Public Affairs Committee of Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis Jewish Community Relations Council
South Bend Jewish Federation of St. Joseph Valley
Jewish Community Relations Council of Indiana
Greater Des Moines Jewish Federation
Louisville Jewish Community Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation—Community Council
Baltimore Jewish Community Relations Council
Metropolitan Boston Jewish Community Council
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit Jewish Community Council
Flint Jewish Federation
Minneapolis Minnesota and Dakotas Jewish Community Relations Council—Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis Jewish Community Relations Council
Omaha Jewish Community Relations Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Bergen County Jewish Community Relations Council of United Jewish Community
Cherry Hill Jewish Community Relations Council of Southern New Jersey Jewish Federation
Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish Community Federation
Northern Middlesex County Jewish Federation
Raritan Valley Jewish Federation
Union Central New Jersey Jewish Federation
Wayne North Jersey Jewish Federation
Albuquerque Jewish Community Council
Greater Albany Jewish Federation
Binghamton Jewish Federation of Broome County
Brooklyn Jewish Community Council
Greater Buffalo Jewish Federation
Elmira Community Relations Committee of Jewish Welfare Fund
Greater Kingston Jewish Federation
New York Jewish Community Relations Council
Rochester Jewish Community Federation
Greater Schenectady Jewish Federation
Syracuse Jewish Federation
Utica Jewish Community Council
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati Jewish Community Relations Council
Cleveland Jewish Community Federation
Columbus Community Relations Committee of Jewish Federation
Greater Dayton Community Relations Committee of Jewish Federation
Toledo Community Relations Committee of Jewish Welfare Federation
Youngstown Jewish Community Relations Council of Jewish Federation
Oklahoma City Jewish Community Council
Tulsa Jewish Community Council
Portland Jewish Federation
Allentown Community Relations Committee of Jewish Federation

Erie Jewish Community Council
Greater Philadelphia Jewish Community Relations Council
Pittsburgh Community Relations Committee of United Jewish Federation
Scranton-Lackawanna Jewish Council
Greater Wilkes-Barre Jewish Federation
Providence Community Relations Committee of Rhode Island Jewish Federation
Charleston Jewish Community Relations Committee
Columbia Community Relations Committee of Jewish Welfare Federation
Memphis Jewish Community Relations Council
Nashville and Middle Tennessee Jewish Federation
Austin Jewish Community Council
Greater Dallas Jewish Community Relations Council of Jewish Federation
El Paso Jewish Community Relations Committee
Greater Houston Jewish Federation
Fort Worth Jewish Federation
San Antonio Jewish Community Relations Council of Jewish Federation
Newport News-Hampton Jewish Federation
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison Jewish Community Council
Milwaukee Jewish Council